(6)

No. 95-1621

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HARBOR TUG AND BARGE COMPANY,
Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Can an injured land-based maritime worker sue for seaman remedies after an Administrative Law Judge has formally determined that he was an LHWCA worker and not a seaman at the time of the injury?

II. Is a claimant's status as a seaman to be determined by his work history with his employer at the time of the injury, or by his entire work history?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai.

Defendant/Petitioner:

Harbor Tug and Barge Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Harbor Tug and Barge Company discloses that it formerly was a California corporation, and that on August 1, 1992 it was merged into Crowley Marine Services, Inc., a Delaware corporation. Crowley Marine Services, Inc. (which has no subsidiaries that are not wholly owned) is a wholly owned subsidiary of Crowley Maritime Corporation, a California corporation.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated September 25, 1995, is reported at 67 F.3d 203 (9th Cir. 1995) and is reproduced in Appendix A to the Petition For Writ of Certiorari ("Pet. App."), pp. 1a-19a. The Court of Appeals' unreported Order dated December 12, 1995, denying Harbor Tug and Barge Company's petition for rehearing or rehearing *en banc* is reproduced in Appendix B at Pet. App. pp. 20a-21a.

The following unreported rulings of the District Court are reproduced in the Appendices to the Petition: Order Granting Partial Summary Judgment To Defendant Harbor Tug and Barge Company, May 29, 1990, Appendix C, Pet. App. pp. 22a-23a; Order Of Denial Of Reconsideration And Statement Of Grounds For Immediate Appeal, August 17, 1990, Appendix D, Pet. App. pp. 24a-25a; Order Confirming Summary Adjudication That Plaintiff Was Not A Seaman, April 6, 1992, Appendix E, Pet. App. pp. 26a-27a; and Judgment In Favor Of Defendant

Harbor Tug And Barge Company, December 28, 1992, Appendix F, Pet. App. pp. 28a-29a.

The unreported Decision and Order of Administrative Law Judge Paul Mapes dated August 27, 1992, in Case No. 92-LHC-403, OWCP No. 13-85230, is reproduced in Appendix G at Pet. App. pp. 30a-57a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on September 25, 1995. On October 6, 1995, Harbor Tug and Barge Company duly filed its Petition for Rehearing or Rehearing *En Banc*, which the Ninth Circuit denied by Order dated December 12, 1995. This Court granted the Petition For Writ of Certiorari on October 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are: (i) 33 U.S.C. § 902(3)(G), reproduced in Appendix H at Pet. App. p. 58a. This section is part of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*; (ii) 33 U.S.C. § 905(a), quoted in the brief; (iii) 46 U.S.C. § 688(a), the "Jones Act." The relevant portion of § 688(a) is reproduced in Appendix H at Pet. App. p. 58a.

STATEMENT OF THE CASE

A. Statement Of Facts.

1. *The Accident.*

Respondent John Papai ("Papai") injured his knee while painting aboard the tug PT. BARROW (the "Tug"), which was docked at Alameda, California. The Tug was operated by petitioner Harbor Tug and Barge Company ("HTB").

Papai was not a permanent employee of HTB and was not permanently assigned to the Tug. He worked at various maritime related jobs for various companies. (J.A.

29-30.)[1] He obtained his maritime jobs through the Inland Boatman's Union ("IBU") hiring hall. (J.A. 29-30.) The job he was performing on the day he was injured was a one-day maintenance painting job. (J.A. 35, 48.)

On the morning of March 13, 1989, Papai arrived at the HTB Dock in Alameda. (J.A. 43.) Don Dawson of HTB, a shoreside port captain who was Papai's supervisor that day, told Papai and Edwin Low, a co-worker, to paint the "house" (the superstructure) on the Tug. (J.A. 37-45.)

The Tug was tied to the dock and was unmanned; no operational crew members were aboard that day. Papai did not take any orders from any Tug officers. (J.A. 36-37, 39, 47-48.) The engines of the Tug were not running while Papai was aboard. (J.A. 48.)

Papai and Low went to the Tug and began painting. In the late morning, Dawson asked Low to leave the Tug and work on another HTB tug nearby. Low did so, and thereafter Papai worked alone. (J.A. 39-40, 45-47.)

At about 3.30 p.m. Papai was painting the forward side of the house, using a portable ladder. He alleges that as he was climbing down, the ladder "moved," causing him to fall and injure his knee. (J.A. 49-50.)

2. *Papai's Work History.*

Papai entered the work force in 1968. Between 1968 and 1972 he worked as a mail clerk for the federal government. From 1972 through 1977 he owned and managed a bar. From 1979 to 1983 he worked as a bartender at various shoreside establishments. During the 1983-1986 period, he worked for a company that performed catering services for party and ferry boats. He worked aboard the boats but did not live on them. The catering company that employed him did not own or operate the vessels. His job was to help stock the vessels with food, set up, serve the food, and clean up afterward. (J.A. 20-27.)

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[1] "J.A." references are to the Joint Appendix.

In 1987 Papai began to obtain short-term jobs out of the IBU hiring hall in San Francisco, California. From then until the date of the accident in March 1989 Papai worked at various jobs for various employers. (J.A. 29-30.) Most of the jobs were for a single day, but some were for two or three days. (J.A. 34.) The longest employment Papai had while working out of the IBU hiring hall was for 40 days, during which he worked for the Golden Gate Transit District chipping rust and painting the dock at the San Francisco Ferry Terminal. (J.A. 29-30.) Usually, however, once Papai finished a job for the day, he returned to the IBU hiring hall the next day to bid for another job. (J.A. 34.)

The maritime jobs Papai had during the 1987-March 1989 period included maintenance jobs, seagoing deckhand jobs, and longshoring jobs. Maintenance jobs consisted of chipping rust and painting. This was done while the vessels were tied to a dock. Seagoing deckhand jobs (which constituted the majority of his jobs) consisted mainly of manning the lines on working boats during docking and undocking. Longshoring jobs consisted of helping to load and discharge vessels that were docked. (J.A. 30-32.) Papai also did some shoreside bartending during this period. (J.A. 32-33.)

From January 1, 1989 until March 13, 1989, the date of the accident, Papai occasionally worked for HTB, for a total of thirteen days. He last worked for HTB about nine days before the accident, on a different tug. (J.A. 44.) Although Papai had worked on the PT. BARROW a few times, he had performed only maintenance work, chipping rust and painting. (J.A. 34-35, 38.) During these prior jobs on the PT. BARROW, the Tug had always been tied to the dock. (J.A. 34-35.) After each day's work on the Tug, Papai went home; he did not live on the Tug. (J.A. 35.)

Papai's employment on the day of the accident was, like his prior work on the Tug, a one-day job. (J.A. 35, 48.) Although his job title was "deckhand," he knew

before starting that the work was a maintenance painting job rather than a seagoing deckhand job, and that the Tug would remain tied to the dock. (J.A. 44.) Papai was not going to sail with the Tug; he planned to return to the IBU hiring hall the next day to bid for another job. (J.A. 35, 48, 50-51.)

B. Procedural History Of The Case.

1. *Papai's Civil Action.*

In January 1990 Papai filed his Complaint against HTB in the U.S. District Court for the Northern District of California, seeking damages for personal injuries, and alleging causes of action for negligence under the Jones Act (46 U.S.C. § 688) and for unseaworthiness under the general maritime law. (J.A. 14-18.) Papai could assert such causes of action only if he was a "seaman" at the time of his accident. In April 1990 HTB moved for summary adjudication that at the time of the accident Papai was not a seaman. The District Court (Judge Charles A. Legge) granted HTB's Motion by Order dated May 29, 1990. (Pet. App. pp. 22a-23a.)

In May 1990 Papai filed a First Amended Complaint against HTB for damages for personal injuries, asserting a cause of action for negligence under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*, and under general negligence principles. (J.A. 63-66.)

In June 1990 Papai moved for reconsideration of the District Court's determination that he was not a seaman. By Order dated August 17, 1990, the Court denied the Motion and reaffirmed that Papai was not a seaman. (Pet. App. pp. 24a-25a.) Following two subsequent U.S. Supreme Court decisions concerning seaman status,[2] the Dis-

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[2] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991).

trict Court asked for further briefing on the seaman status issue. On April 6, 1992, following that briefing, the District Court issued an order confirming that at the time of the accident Papai was not a seaman within the meaning of the Jones Act or the general maritime law. The Court found that Papai "did not have a 'more or less permanent connection' with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status." (Pet. App. pp. 26a-27a.)

Trial was to the District Court without a jury in August-September 1992. The Court held that Papai had failed to establish any negligence by HTB under either § 905(b) of the LHWCA or under general negligence principles. (J.A. 81-86.) The District Court therefore issued a Judgment in favor of HTB. (Pet. App. pp. 28a-29a.) Papai appealed to the Ninth Circuit Court of Appeals.

2. *Papai's LHWCA Compensation Action.*

While Papai's civil action was pending, his LHWCA compensation action also was underway. Soon after his injury, Papai had made a claim against HTB under the LHWCA for compensation and medical benefits. HTB paid Papai those benefits on an interim basis. Papai and HTB disputed several LHWCA compensation issues, however, including LHWCA coverage (which depended upon Papai's status as an LHWCA worker or a seaman). Members of the crew of a vessel (*i.e.*, seamen) are excluded from LHWCA coverage and are not entitled to LHWCA benefits. 33 U.S.C. § 902(3)(G).

LHWCA compensation issues are determined by formal administrative trials before an Administrative Law Judge ("ALJ"). On June 2, 1992, ALJ Paul Mapes held a formal trial in the LHWCA case. He received oral testimony, deposition testimony, exhibits, and briefing by the parties. On August 27, 1992, the ALJ issued his written Decision and Order. (Pet. App. pp. 30a-57a.)

In his decision the ALJ addressed in detail the issue of Papai's status as an LHWCA worker or as a seaman.[3] In the LHWCA compensation action, Papai asserted that he was an LHWCA worker rather than a seaman, and that he therefore was entitled to compensation under the LHWCA. HTB took the position in the LHWCA compensation action that if Papai was a seaman, as he was asserting in the civil action, then he was excluded from LHWCA coverage.

The ALJ held that the evidence showed that Papai was an LHWCA worker, not a seaman, and thus that Papai was entitled to LHWCA compensation benefits.[4] (Pet. App. pp. 34a-37a.) On that basis the ALJ made a formal award of benefits to Papai. (Pet. App. pp. 54a-55a.) Papai has received those benefits.

A decision by an ALJ in an LHWCA compensation case can be appealed to the Benefits Review Board ("BRB"), and from the BRB to the Court of Appeals. 33 U.S.C. § 921; 20 CFR Parts 801-2. Neither Papai nor HTB appealed the ALJ's Decision and Order of August 27, 1992. Thus it became final and binding.

3. *The Appeal Of The Civil Action.*

On September 25, 1995, the Court of Appeals below (Judge Poole dissenting) reversed the District Court's ruling on summary adjudication that Papai was not a seaman, and it held that a jury should have decided that

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[3] The ALJ was aware of the District Court's Orders re seaman status. However the ALJ considered these Orders to be interlocutory in nature. Pet. App. p. 35a, fn. 2.

[4] The ALJ, based upon the evidence presented at the LHWCA hearing, found that all of Papai's jobs were obtained through the union hiring hall, that none of his jobs lasted more than two or three days at a time, that he had a variety of different employers and worked on a variety of different ships, that he lived on shore and not on the ships, that (although he had worked aboard the Tug before) the job he was performing on the date of injury was of only one day's duration, and that his assignment to any vessel or fleet of vessels was random, sporadic, and transitory. (Pet. App. p. 37a.)

issue. (67 F.3d 203, Pet. App. pp. 1a-19a.) The Court of Appeals also held that the ALJ's decision that Papai was an LHWCA worker and not a seaman did not bar Papai's claim to seaman remedies in the civil action.

SUMMARY OF ARGUMENT

The Formal Award Of LHWCA Compensation Benefits Should Preclude Further Claim To Seaman Remedies.

The remedies for injured maritime workers covered by the LHWCA and those for seamen are mutually exclusive. While an injured maritime worker may pursue both remedies until a determination is made of his entitlement to LHWCA benefits, once he is formally awarded those benefits, the claimant should not be allowed to seek seaman remedies. This is mandated by § 905(a) of the LHWCA and supported by the Congressional intent as expressed in the legislative history. Also, the doctrine of administrative collateral estoppel precludes seaman remedies once an Administrative Law Judge has determined that a claimant is covered by the LHWCA. An administrative determination of the claimant's status as an LHWCA worker and not a seaman should be given binding recognition. To preclude the claimant from seeking a second remedy comports with Congressional intent, avoids unjust and inconsistent status determinations, and avoids duplicative judicial proceedings over the same subject matter. In this case, the ALJ determined that Papai was an LHWCA worker, not a seaman, and granted him LHWCA benefits. Thus he should be precluded from further seeking seaman remedies.

A Claimant's Status As A Seaman Should Be Based Upon His Connection To The Vessel To Which He Is Assigned When Injured Or, In Certain Circumstances, An Identifiable Group Of Vessels Belonging To His Employer.

A prerequisite for seaman status is that the claimant have a substantial connection to the vessel to which he is

assigned when the injury occurs. Under certain limited circumstances known as the Fleet Seaman Doctrine, however, the claimant's relationship to several or all of the employer's vessels may be considered. This doctrine has been applied when the claimant is a steady employee who regularly performs seaman's work for a specific employer on multiple vessels belonging to that employer, to none of which he has a permanent or substantial connection. The Court of Appeals' decision below greatly expands the seaman status test by allowing the trier of fact to consider the claimant's entire work history, including his connection with all the vessels on which he has worked for all of his employers. The Court of Appeals' opinion on this point, which is based upon a misreading of dictum in the recent Supreme Court decision in *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995), has no basis in precedent. The Court of Appeals' test would make seaman status unpredictable because it would be based upon virtually unlimited jury discretion to consider the claimant's past or subsequent sea service. The special remedies appertaining to seaman status should be accorded to seamen in being, not to former or expectant seamen. Whether a claimant has seaman status should be limited to his connection to the vessel (or identifiable group of vessels belonging to his employer) to which he is assigned when the injury occurs. Under this rule, the District Court below correctly concluded that Papai—who was working on a one-day maintenance painting job while the Tug was tied to the dock—did not have a sufficient connection to the Tug to be considered a seaman.

ARGUMENT

I. THE FORMAL AWARD OF LHWCA COMPENSATION BENEFITS SHOULD PRECLUDE FURTHER CLAIM TO SEAMAN REMEDIES.

Congress has clearly stated its intention that LHWCA worker remedies and seaman remedies be mutually exclusive. This Court has recognized that principle. Where, as in this case, a final determination has been made that a worker is an employee covered by the LHWCA, that

finding should be given preclusive effect as to subsequent claims to seaman remedies. The plain text of the LHWCA, its legislative history, and the policy underlying the statute all confirm that a formal award of LHWCA benefits precludes further seaman remedies.

A. Seaman Remedies And LHWCA Remedies Are Mutually Exclusive.

1. *Seaman Remedies (The Jones Act).*

The Jones Act, passed in 1920, provides a cause of action in negligence to any "seaman" injured in the course of his employment. 46 U.S.C. § 688(a). Under the general maritime law before 1920, an injured seaman could seek damages from the shipowner only if the vessel's unseaworthiness caused the injuries. An injured seaman also was entitled (regardless of fault for the injury) to "maintenance" (subsistence) and "cure" (medical care) until he recovered. However, the seaman could not sue for negligence. The Jones Act added a negligence cause of action against the employer to the seaman's potential remedies for injury. *Chandris, Inc. v. Latsis,* —— U.S. ——, 115 S.Ct. 2172, 2183, 132 L.Ed. 2d 314, 328, (1995). If an employer is held liable for negligence under the Jones Act or for unseaworthiness under the general maritime law, the injured seaman may recover for past wage loss, future wage loss, medical expenses, and general damages for pain and suffering. 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994), § 6-18, pp. 297-303.

2. *LHWCA Remedies.*

The LHWCA (33 U.S.C. § 901 *et seq.*) was enacted in 1927 to provide a form of workers' compensation in lieu of tort damages for land-based maritime workers, particularly longshoremen, but also others who perform shore-based work in connection with vessels. At the time of its enactment such workers generally were excluded from state workers' compensation coverage. The LHWCA requires an employer to provide wage compensation and medical benefits to an injured LHWCA worker regardless

whether the employer was at fault for the injury, so long as the injury arises out of the worker's employment. In return for compelling the employer to pay the wage compensation and medical benefits regardless of fault, the LHWCA sets a schedule of benefits and grants the employer immunity from tort liability for the injury. 33 U.S.C. § 905(a); 1 Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994), § 7-1, pp. 371-2. The LHWCA covers specified "employees" as defined in the Act, which expressly excludes "a master or member of a crew of any vessel." 33 U.S.C. § 902(3).

Under the LHWCA, a formal award of benefits can be achieved in either of two ways. The first is by way of a formal hearing before an ALJ, akin to a civil trial.[5] The second is by way of a formal settlement between the parties, approved by an ALJ or the district director of the Department of Labor, Office of Workers' Compensation Programs ("OWCP"). The requirements for this kind of formal settlement are set forth in 33 U.S.C. § 908(i), and thus such a resolution is commonly known as a "§ 8(i)" settlement. Under § 908(i), the parties must submit the terms of the settlement to an ALJ or to the district director [6] for approval, to ensure that the settlement is adequate in amount and not procured by duress.[7] Approval of the settlement constitutes an enforceable compensation award, and discharges the employer from further

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[5] This is how Papai obtained his award.

[6] The district director was formerly known as the "deputy commissioner." 20 CFR 782.105.

[7] The elaborate requirements for submitting a settlement for approval are set forth in 20 CFR §§ 702.241-243. The settlement application must contain a description of the incident, the nature of the injury, the medical care rendered, and the compensation paid. § 702.242(a). The application must contain a description of the terms of the settlement, the reasons for the settlement, the issues in dispute, particulars about the claimant, the claimant's work history, the claimant's current medical status, justification about the adequacy of the settlement amount, and the claimant's need for future medical care. § 702.242(b).

liability under the LHWCA for the subjects covered by the settlement. 33 U.S.C. § 908(i).

In addition to the scheduled LHWCA compensation benefits due from the employer, an injured LHWCA worker has the right to sue third parties for negligence causing the injury. 33 U.S.C. § 905(b). Such third parties include the owner and operator of the vessel on which the worker is injured. Under the "dual capacity doctrine," an LHWCA worker can sue the shipowner even if the shipowner also is his employer, but he can sue the dual shipowner/employer only for negligence in its shipowner capacity, not for negligence in its employer capacity. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 529, fn. 6, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983); *Reed v. S.S. Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963).[8]

3. *Seaman Remedies And LHWCA Remedies Are Mutually Exclusive.*

The plain text of the LHWCA demonstrates that when an employer is liable under the LHWCA, that employer may not be held liable under any other remedy scheme, including the Jones Act. LHWCA § 905(a) states:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . .

A brief review of the LHWCA's history emphasizes the importance of the legislative policy underlying the exclusivity of the employer's liability. On several occasions since the enactment of the Jones Act in 1920, Congress expressed its strongly-held belief that maritime workers covered by the LHWCA are not entitled to bring a Jones Act negligence action against their employer.

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[8] Thus Papai as an LHWCA worker was able to sue HTB for negligence under § 905(b)—even though HTB was Papai's employer and paid him LHWCA benefits—in HTB's capacity as the operator of the Tug. Following trial of Papai's § 905(b) negligence claim, the court found that HTB was not negligent. (J.A. 81-86.)

As early as 1922, Congress expressed its intent to treat land-based maritime workers differently from seamen. In response to Supreme Court decisions that state workers' compensation laws could not constitutionally apply to land-based maritime workers, Congress passed a law to provide a remedy for those workers separate from the Jones Act, by extending state workers' compensation coverage to them.[9] Although the Supreme Court struck down the law,[10] the importance that Congress placed upon treating land-based maritime workers differently from seamen was clear. The legislative history states:

> There is a clear distinction between the two classes, seamen and landsmen . . . The distinctions are based upon the fact of their employment, upon the separate systems of law which have hitherto been applied to them, and the character of employers . . . .[11]

The legislative history emphasizes that the special remedies available to a seaman are "of great antiquity" and that this "marks him off very clearly from the landsman who works in port." [12]

Two years after declaring unconstitutional the remedial scheme that Congress adopted for land-based maritime workers, the Supreme Court interpreted the term "seaman" in the Jones Act "to include stevedores employed in maritime work on navigable waters." [13] Congress responded to this blurring of the line between seamen and land-based workers by enacting the LHWCA in 1927. The LHWCA was adopted to provide an exclusive compensation remedy for land-based maritime workers, excluding from its coverage "a master or member of a crew

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[9] Act of June 10, 1922, ch. 216, 42 Stat. 634.

[10] *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302, 68 L. Ed. 646 (1924).

[11] S. Rep. No. 94, 67th Cong., 1st Sess. 2 (1921).

[12] *Id. See also* H.R. Rep. No. 639, 67th Cong., 2d Sess. 4 (1922) ("Congress has always in legislating distinguished between these port workers and seamen.")

[13] *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).

of any vessel." [14] As used in the LHWCA, that phrase has been interpreted as having the same meaning as the term "seaman" in the Jones Act.[15] Moreover, in enacting the LHWCA, Congress specifically rejected an amendment to include seamen within the scope of the legislation.[16]

Twenty years later the Supreme Court allowed land-based maritime workers to assert the seaman's claim of unseaworthiness against shipowners.[17] Congress explicitly overturned this decision in 1972.[18] Again, Congress expressed its intent to preserve the distinct special remedies afforded to seamen, while treating land-based maritime workers like other employees under typical workers' compensation systems. The 1972 legislation eliminated the unseaworthiness cause of action for land-based maritime workers. However, Congress allowed LHWCA workers to assert negligence actions against the owners of ships on which they are injured, just as employees covered by a workers' compensation system can sue premises owners or other third parties whose negligence causes a workplace injury. 33 U.S.C. § 905(b).

The legislative history of the 1972 amendments illustrates the strong concern of Congress that the distinction

[14] 33 U.S.C. §§ 902(3)(G).

[15] *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7-8, 66 S.Ct. 869, 90 L.Ed. 1045 (1946). *See also McDermott Int'l, Inc. v. Wilander*, 448 U.S. 337, 347, 111 S.Ct. 807, 112 L.Ed.2d 111 (1991); *Chandris*, 115 S.Ct. at 2183, 132 L.Ed.2d at 329.

[16] 69 Cong. Rec. 5410 (1927) (statement of Rep. Graham). Congress only considered including seamen within the LHWCA in order to respond to perceived constitutional issues raised by earlier Supreme Court decisions. *Id.* The seamen themselves "bitterly opposed" their inclusion in the bill. 69 Cong. Rec. 5414 (1927) (statement of Rep. Davis). *See also South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256-7, 60 S.Ct. 544, 84 L.Ed. 732 (1940).

[17] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946).

[18] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972).

between seamen and land-based maritime workers be maintained:

> In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.

S. Rep. No. 1125, 92d Cong., 2d Sess. 9-10 (1972).

In recent decisions this Court has consistently recognized that the LHWCA and the Jones Act are mutually exclusive compensation regimes, since the Jones Act applies only to a "seaman" and the LHWCA expressly excludes "a master or member of a crew of any vessel," which is synonymous with "seaman." [19]

In summary, Congress has clearly stated its intent that a claimant found to be an "employee" under the LHWCA is entitled only to the remedies provided in that statutory scheme and is not entitled to the remedies accorded to a seaman. The legislative history over more than seventy years demonstrates that this policy is based upon Congress' deeply rooted belief that land-based maritime workers are not subject to the same hazards as are seamen.

B. Until A Claimant's Status Is Determined, The Claimant May Pursue Both LHWCA Remedies And Seaman Remedies Without Having To Make An Election Of Remedies.

The mere receipt of LHWCA benefits, which may be paid voluntarily by an employer in the absence of an ALJ hearing or § 8(i) settlement, does not in itself preclude seaman status. Therefore, a claimant may pursue both

[19] *McDermott Int'l ,Inc.*, 448 U.S. at 347; *Chandris*, 115 S.Ct. at 2183, 132 L.Ed.2d at 329.

potential remedies—LHWCA and seaman (including the Jones Act)—until his status is formally determined.

The Supreme Court recently confirmed this in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 116 L.Ed. 2d 405 (1991). In that case an injured rigging foreman's employer voluntarily paid him LHWCA benefits. Gizoni later sued the employer for negligence under the Jones Act. The Court held in relevant part that the mere receipt of LHWCA benefits paid voluntarily by an employer in the absence of a formal LHWCA award does not in itself preclude seaman status. 502 U.S. at 91.

Gizoni did not address the situation presented here, where the worker's status was litigated in the LHWCA proceeding and a formal award of LHWCA benefits was made. The *Gizoni* decision suggests that the Court would have viewed this situation differently. *Gizoni* stated that an employee who receives voluntary LHWCA payments without a formal award is not barred from subsequently seeking relief under the Jones Act "because the question of coverage has never actually been litigated." 502 U.S. at 91. The implication is that if coverage had been litigated, the employee could not later seek relief under the Jones Act. In the case at bar, the question of coverage was litigated, so the principal rationale for the *Gizoni* decision on this point is absent.

The *Gizoni* decision interpreted the statutory scheme as not intended to force the injured worker to make an initial election of remedies that could preclude any recovery at all. For example, assume that a claimant sought LHWCA benefits, and an ALJ thereafter denied those benefits on the ground that he was a seaman. If the strict rule of election of remedies applied, he would then be unable to pursue a Jones Act remedy because he had previously elected to seek an LHWCA remedy. Obviously this would be unfair. Thus, making a claimant choose between the potential right to an immediate workers' compensation remedy and the Jones Act remedy to which he may be entitled would "force injured maritime workers

to an election of remedies we do not believe Congress to have intended." 502 U.S. at 92, fn. 5.

In the case at bar, however, Papai is not subject to an election of remedies, and the attendant risk of losing all remedies if he initially selected the wrong one. He prevailed in the LHWCA proceeding and has received an award of LHWCA benefits.[20]

C. A Claimant Who Has Been Formally Awarded LHWCA Benefits Should Be Precluded From Thereafter Pursuing Seaman Remedies.

Since the LHWCA and seaman remedy schemes are mutually exclusive, a formal award of LHWCA benefits should be sufficient to effectuate that exclusivity and preclude further seaman remedies. To award LHWCA benefits, an ALJ must find that the claimant is a covered worker, i.e., not a seaman.[21] This finding should be given effect in a subsequent Jones Act action. To do so comports with the Congressional intent expressed in the LHWCA, avoids unjust and inconsistent status determinations, and avoids duplicative judicial proceedings over the same subject matter.

1. *The Preponderant Authority Holds That A Formal Award Of LHWCA Benefits Precludes Further Claim To Seaman Remedies.*

While the Supreme Court has not directly addressed the issue, the preponderant authority in the Courts of Appeals is that a formal award of LHWCA benefits—whether as a result of an ALJ hearing or a § 8(i) settlement—precludes a further claim to seaman remedies. The

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[20] The Court of Appeals opinion below allowed Papai to pursue seaman remedies *even after* a formal award of LHWCA benefits. This was premised upon the notion that its decision was "extending the reasoning of the *Gizoni* court to the next logical step. . . ." 67 F.3d at 208, Pet. App. p. 12a. That premise must be rejected. A step it may be, but given LHWCA § 905(a), it is not a logical one.

[21] The ALJ explicitly so found in this case. *See* the Decision of ALJ Mapes, at Pet. App. 37a ("the claimant cannot be regarded as a member of the crew of any ship or fleet of ships.")

most prominent case on the subject is *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992). In that case the Fifth Circuit held that an ALJ order approving a settlement of LHWCA benefits under § 8(i) precluded subsequent seaman remedies. The *Sharp* court emphasized that while Congress did not intend that a claimant forfeit the right initially to pursue both remedies simultaneously, Congress also did not intend that the claimant be able to pick and choose his ultimate recovery based upon which remedy conferred upon him a larger award. The court noted that the LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, the Act is intended to benefit employers, too, giving them limited and predictable liability in exchange for conceding their right to defend the claim on the ground of absence of fault. 973 F.2d at 425-7.

The Fifth Circuit Court of Appeals explained its view of the principles underlying the preclusive effect of an ALJ's determination of a claimant's LHWCA status in *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-1133 (5th Cir. 1991):

> Permitting a trial court to redetermine issues decided by the administrative system effectively defeats the purpose of the LHWCA. Instead of creating certainty for both employer and employee, permitting a trial court to redetermine the coverage issue reintroduces uncertainty for both. Instead of lowering the cost of recovery for an injured worker, the worker must pay counsel both for representation on the LHWCA claims and again in seeking a jury award. Furthermore, if we permit a trial court and the Department [of Labor] to reach inconsistent determinations of the coverage issue, an injured worker may receive both a jury trial and an LHWCA remedy, or neither, despite the intention of Congress that he receive one or the other. In enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award. [Footnotes omitted.]
>
> While we recognize that there are differences between the fact-finding processes in the administrative forum and in the judicial forum, we doubt that these differences are sufficient to deprive an injured employee of a fair opportunity to present the coverage issue before the Department. [Footnote omitted.] As a result, a finding of LHWCA coverage sought and obtained by the injured worker from the Department should preclude any subsequent action against his employer for the same injury.

The Court of Appeals for the Second Circuit, too, has held that a formal award of compensation under the LHWCA precludes subsequent recovery of seaman remedies. *Hagens v. United Fruit Co.*, 135 F.2d 842 (2d. Cir. 1943).[22]

2. *A Formal Award Of LHWCA Benefits Should Be Given Preclusive Effect.*

a. ***To Uphold The Provisions And Intent Of The LHWCA, A Formal Award Of LHWCA Benefits Should Per Se Preclude Further Seaman Remedies.***

As related above, the LHWCA by its express terms is the exclusive liability of the employer for an injury under its coverage. 33 U.S.C. § 905(a). The legislative history and court decisions interpreting the LHWCA confirm the mutual exclusivity of LHWCA remedies and seaman remedies. As a matter of law, therefore, the formal award of

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[22] The Court of Appeals for the Ninth Circuit had followed the rule of collateral estoppel on this point. *Figueroa v. Campbell Indus.*, 45 F.3d 311 (9th Cir. 1995). *Cf. Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2nd Cir. 1963), in which a tugboat operator had prevailed in a New Jersey workers' compensation proceeding on the ground that the claimant was a seaman (and thus excluded from compensation coverage). The court held that the tugboat operator was estopped from arguing in a subsequent Jones Act action that the plaintiff was not a seaman.

LHWCA benefits, whether by an ALJ trial or § 8(i) settlement, should per se preclude further seaman remedies. This conclusion is based upon the statutory interplay of the two remedy schemes.[23]

This conclusion does not depend upon the application of the doctrine of administrative collateral estoppel. While this case could be decided upon the ground that collateral estoppel applies, application of that doctrine is unnecessary, for the plain meaning of § 905(a) and the expressed Congressional intent is that a claimant who is awarded benefits under the LHWCA is precluded from seeking other remedies against his employer.

One of the traditional elements of collateral estoppel is that the issue in question be actually litigated. That often does not occur in an LHWCA proceeding, either because the employer concurs that the claimant is an LHWCA worker, or the parties reach a § 8(i) settlement. The LHWCA was intended to provide a prompt remedy to an injured worker without the expense, uncertainty, and delay that tort actions entail.[24] Requiring actual litigation of the status issue defeats this objective. If the only way that an employer can protect itself from a subsequent Jones Act claim is to litigate the claimant's status in the LHWCA proceeding, the employer will be forced to demand a hearing (rather than enter into a § 8(i) settlement) and take a position—perhaps contrary to its belief —that the claimant is a seaman, in order to ensure that

[23] Although not directly at issue in this case, HTB accepts all the corollaries of the principle of mutual exclusivity: a) If the ALJ denies LHWCA coverage to the claimant because he is a seaman, the employer should be precluded from contesting the claimant's seaman status in a subsequent Jones Act claim. b) If the trier of fact in a Jones Act action grants an award to the claimant, the claimant should be precluded from thereafter seeking further LHWCA remedies. c) If the trier of fact in a Jones Act action denies recovery for the reason that the claimant is not a seaman, the employer should be barred from asserting as a defense in a subsequent LHWCA proceeding that the claimant is a seaman.

[24] *Morrison-Knudsen Const. v. Dir., Office of Wkrs. Comp. Prog.*, 461 U.S. 624, 636, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

the ALJ will "actually litigate" the status issue. This injects into the LHWCA proceeding a wholly unnecessary issue.

The disputation will not end there, for it would be an unimaginative claimant's attorney who could not find a way to argue to the court or jury in a subsequent Jones Act suit that the status issue was not "actually litigated" for this purpose. Whether the issue of status was actually litigated in the LHWCA proceeding would be a question of fact in the subsequent Jones Act action. Evidence would have to be presented on this issue, which could become a mini-trial on its own. Until the applicability of collateral estoppel in .he second proceeding is determined, the court and the parties will be subject to the full burden of that proceeding.

Thus the better rule is that § 905(a) per se precludes seaman remedies, whether or not the requirements of collateral estoppel are met. The decision in *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992) points the way. There the Court of Appeals held that a formal LHWCA award, even in the absence of actual litigation of the status issue, precludes further seaman remedies because of the statutory text and purpose of the LHWCA not because of collateral estoppel. HTB requests the Court to adopt that rule.

b. *ALJ Awards Under the LHWCA Satisfy The Requirements Of Administrative Collateral Estoppel.*

If the Court holds that LHWCA § 905(a) does not per se preclude a further claim to seaman remedies, then Papai should be precluded from those remedies on the basis of administrative collateral estoppel. The facts of Papai's case meet even the most stringent possible requirements of collateral estoppel: (1) The question of seaman/non-seaman status was presented to the ALJ; (2) The issue was actually litigated in the administrative proceeding; (3) Determination of the issue by the ALJ was necessary because if Papai was a seaman, then he

was not entitled to LHWCA benefits; and (4) the ALJ made an explicit finding of non-seaman status.

The Supreme Court has held that administrative determinations of fact should be binding. The Court recently reiterated this principle in *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed. 2d 96 (1991): "We have long favored application of the common-law doctrine of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." 501 U.S. at 107. Pursuant to this principle, a formal award of LHWCA benefits (whether by an ALJ hearing or approval of a § 8(i) settlement) in which LHWCA worker status is expressly found should be given effect to preclude a subsequent claim to seaman remedies.

The *Solimino* decision listed the prerequisites for administrative collateral estoppel: the administrative agency must be acting in a judicial capacity resolving disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate. *Solimino*, 501 U.S. at 107, citing *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed. 2d 642 (1966). LHWCA awards satisfy these requirements.

(1) *No Statutory Intent Precludes The Application Of Administrative Collateral Estoppel In This Case.*

The *Solimino* case stated an exception to the imposition of administrative collateral estoppel. The Court noted that Congress legislates against a background of common-law adjudication principles, including collateral estoppel. Thus courts may take it as given that Congress has legislated with an expectation that the principle will apply unless a contrary statutory purpose is clearly evident.[25]

[25] *Solimino*, 502 U.S. 104, 108. In *Solimino*, the Court found that the statute at issue in that case contained provisions that "make clear that collateral estoppel is not to apply." 502 U.S. at 110-11.

The LHWCA contains no evident statutory purpose to overcome the presumed application of administrative collateral estoppel. Neither the statutory text, nor the legislative history, nor the policies underlying the LHWCA reveal any such intent. Indeed, these sources strongly confirm that Congress intended for the LHWCA and the Jones Act to be mutually exclusive, even where all the formal elements of collateral estoppel are not met.

The text of the statute alone suffices on this point. Section 905(a) provides that the liability of an employer under the LHWCA "shall be exclusive and in place of all other liability of such employer to the employee." The plain meaning of this provision is that if a worker is found to be covered by the LHWCA, the employer is not to be subject to any other remedies, including the Jones Act.

The only implication in the Act that collateral estoppel arguably may not apply is in § 903(e), which allows a credit to the employer against its liability under the LHWCA for amounts paid to the claimant pursuant to any other workers' compensation law or the Jones Act. Section 903(e) was added to the LHWCA in 1984 as part of a package of amendments. Longshore and Harbor Workers Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984). The main purpose of section 903(e) was to address the interplay of the LHWCA with state workers' compensation schemes. *See* H.R. Rep. No. 98-570, 98th Cong., 1st Sess., pt. 1, at 26 (1983). The legislative history is silent about why the Jones Act was included.[26] By its own terms, § 903(e) provides an offset only when a claimant seeks an LHWCA recovery after receiving a payment under the Jones Act; it does not cover the situation presented in the present case, where a Jones Act recovery is sought after payment

[26] *See* H.R. Rep. No. 570, 98th Cong., 1st Sess., pt. 1 (1983) and H.R. Conf. Rep. No. 1027, 98th Cong., 2nd Sess (1984), *reprinted in* 1984 U.S.C.C.A.N. 2734, *et seq. See also* S. Rep. No. 81, 98th Cong., 1st Sess. (1983).

is made under the LHWCA. To argue that § 903(e) evidences a Congressional intent to overcome the collateral estoppel effect of an LHWCA award requires a chain of inference too weak to lift the firm anchor provided by the plain text of LHWCA § 905(a).[27]

In summary, the statutory text of the LHWCA not only is devoid of intent to overcome the presumption of collateral estoppel, it is strongly supportive of that presumption. The legislative history of the statute also supports the conclusion that workers receiving a formal LHWCA award should be precluded from seaman remedies. Congress has repeatedly stated that LHWCA remedies are exclusive, not a stepping stone to a Jones Act jury trial.

The Court of Appeals decision in this case may have been influenced by the general objective of the LHWCA to assist injured workers. The Supreme Court, however, has warned against interpreting the statutory scheme based upon a court's understanding of the general statutory policy:

> No legislation pursues its purposes at all costs. Deciding whether competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-6, 107 S. Ct. 3191, 94 L.Ed. 2d 533 (1987) (per curiam) (emphasis in original).[28] The broad objective of the LHWCA should not be read to overcome the text of § 905(a) and that section's legislative history, particularly when the issue is whether Congress intended to overcome a common-law presumption.[29]

[27] If a payment is made in settlement of a Jones Act claim without a finding of seaman status, then the claimant would still be entitled to pursue an LHWCA remedy and the offset provided in § 903(e) would apply. Applying § 903(e) to that situation would give that section effect, while maintaining consistency with the principle of mutual exclusivity of the remedies.

[28] *See also Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74, 106 S. Ct. 681, 88 L.Ed. 2d 691 (1986): "Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action . . . Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."

[29] For instance, assuming that Congress' broad objective was to protect injured employees, this policy could lead to different conclusions about whether to overcome the presumption of administrative collateral estoppel. Inconsistent coverage determinations could result in a worker having no remedy at all, if both tribunals (LHWCA and court) rule against the claimant on status. Thus, this general statutory purpose does not support the conclusion that Congress intended to overcome the presumption of administrative collateral estoppel.

[30] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972), Section 15, codified at 33 U.S.C. § 921(b). *See* H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, *et seq.* The present LHWCA appeal process is set forth in 33 U.S.C. § 921.

(2) *The Bassett Case Does Not Address Collateral Estoppel.*

The process of appealing an LHWCA decision underwent a significant change in 1972. Before that year review of Department of Labor LHWCA decisions was by way of injunction proceedings in the district courts. The 1972 Amendments to the LHWCA created the Benefits Review Board, which thereafter was to hear appeals of ALJ and District Director decisions.[30]

It was under this pre-1972 appeal process that the Supreme Court decided *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940). In that case a laborer fell from a vessel that was supplying coal to another vessel. The worker drowned. The deputy commissioner of the Department of Labor awarded his widow benefits under the LHWCA. The employer sued in federal court to restrain the enforcement

of the LHWCA award, contending that the decedent was a seaman, and hence not covered by the LHWCA. The District Court considered the status question de novo and found that the decedent was a seaman. The Supreme Court held that the District Court erred in assessing the issue anew. The Court noted that seaman status turns on questions of fact, and that Congress in the LHWCA has confided such questions to the Department of Labor. Hence the deputy commissioner's finding of status was conclusive if there was evidence to support it. 309 U.S. at 257.[31]

Bassett addresses the standard of review of a Department of Labor decision under the LHWCA, not whether collateral estoppel should apply to a final decision. *Bassett* does not provide authority for avoiding the application of collateral estoppel through review by the courts of final Department of Labor LHWCA decisions.[32]

In this case, the ALJ determined that Papai was an LHWCA worker and not a seaman. The ALJ's decision was not appealed, and therefore it is final. The issue now is not whether the ALJ was correct in that decision. That is an issue of preclusion or collateral estoppel, not the sufficiency of the evidence before the ALJ.

c. *Allowing Two Proceedings About The Same Injury Will Result In Inconsistencies And Excessive Litigation.*

If an award of LHWCA benefits is not given preclusive effect, then the claimant will be able to re-litigate his

[31] In its *McDermott Int'l, Inc. v. Wilander* decision, the Court confirmed this part of the *Bassett* decision, stating: "If there is evidence to support the deputy commissioner's finding, it is conclusive." 498 U.S. at 356. However, the Court jettisoned *Bassett*'s arguable "aid in navigation" requirement for seaman status. 498 U.S. at 353.

[32] To the extent that *Bassett* is read to allow an exception to the imposition of administrative collateral estoppel if no evidence supports the administrative decision, that exception does not apply in this case. Indeed the contrary is the case here—the relevant evidence overwhelmingly supports the finding that Papai was a land-based worker covered by the LHWCA, not a seaman.

case in a subsequent Jones Act lawsuit. This will result in inconsistencies and excessive litigation.

Allowing inconsistent coverage determinations could result in a worker having no remedy at all. As noted by the Fifth Circuit Court of Appeals in *Fontenot*, allowing inconsistent coverage determinations could result in an LHWCA forum determination that a worker was a seaman (hence denying recovery) and a Jones Act forum determination that the worker was not a seaman (hence denying recovery). *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1133, fn.39 (5th Cir. 1991). This surely would be an unjust result.[33]

The legislative history of the LHWCA reflects Congressional concern about excessive litigation.[34] Allowing both LHWCA and Jones Act proceedings will excessively consume the time and resources of the courts, the ALJs, and the parties. The increase in attorney fees is patent. This does not affect employers only; while employers must pay the attorney fees for a successful claimant under the LHWCA, the claimant must bear some or all of the fee if his claim is unsuccessful. 33 U.S.C. § 928. Also, the LHWCA was intended to provide a benefit to employers, "giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions." *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 426-7 (5th Cir. 1992). These mutual benefits lie at the heart of the LHWCA. If claimants found to be LHWCA workers can subject their employers to lengthy, expensive Jones Act litigation, a basic underpinning of the LHWCA will be effectively abolished.[35]

[33] Similarly, one jury may limit a claimant to an LHWCA remedy, while another jury may allow his co-worker (performing identical job duties) a Jones Act remedy too.

[34] *See* 118 Cong. Rec. 36388 (1972) (statement of Rep. Mink); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 5 (1972) ("The Committee heard testimony that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.")

[35] The Court of Appeals below was concerned that imposing preclusion on the status issue would be a disincentive on the employer's

Therefore a formal award of LHWCA benefits—whether following an ALJ hearing or a § 8(i) settlement—should preclude further seaman remedies. Such a rule would be clear, consistent, and easy to administer, would conserve the resources of the courts, the Department of Labor, and the parties, and would be in conformity with the principle of mutual exclusivity.

d. ***Allowing A Credit Against The Second Recovery Does Not Cure The Deficiencies Of Allowing The Claimant To Pursue Both Remedies Schemes To Conclusion.***

One reason why the Court of Appeals in this case allowed Papai to seek seaman remedies in addition to his LHWCA benefits was the belief that no harm would be done: since HTB would receive a "credit" on the Jones Act award for what HTB had paid in LHWCA benefits, HTB would not have to pay twice, and Papai would not receive a double recovery. (67 F.3d at 207, Pet. App. pp. 10a-11a.) However the credit that an employer receives in a Jones Act case is not necessarily equal to what the employer has paid in LHWCA benefits. Nor is the credit that the employer receives in an LHWCA proceeding equal to what he has paid in a Jones Act case. The use of credits is not a cure for allowing concurrent remedy schemes.

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part to vigorously litigate its defense in the LHWCA action in order to bar the claimant from a subsequent Jones Act action. 67 F.3d at 207, Pet. App. p. 11a. This makes two false assumptions: (1) that a Jones Act claim is always worth more than an LHWCA remedy (the latter is more certain since not dependent upon employer fault), and (2) that the employer controls the order of proceedings (the claimant can drop or stay his LHWCA claim and test the Jones Act waters in court first). The Court of Appeals also was concerned that imposing a ban would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his employee to seek compensation through litigation. *Id.* The Court of Appeals has identified the wrong solution. This can be cured by giving preclusive effect to a § 8(i) settlement, since the employer can then make LHWCA payments without being subject to a Jones Act suit.

(1) ***The Employer's Credit In A Jones Act Case For Prior Payment Of LHWCA Benefits.***

Courts have rarely addressed the credit an employer is to receive when he is found liable in a Jones Act case but has already paid LHWCA benefits. The main authority on the issue is *Massey v. Williams-McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969). That case allowed the credit to be applied only against Jones Act damages items that are comparable to the loss items compensated by the LHWCA benefits, namely the claimant's lost past wages, medical payments, and maintenance, but not against the claimant's Jones Act award for pain and suffering or for loss of earning capacity subsequent to the date of payment of the last compensation benefit (*i.e.*, loss of future earnings).

Thus if the claimant recovers a lower past wage loss award under the Jones Act than he received under the LHWCA,[36] but also recovers a pain and suffering award, the claimant will end up receiving a higher recovery (LHWCA wage loss benefits plus Jones Act pain and suffering) than either statutory scheme separately allowed. Exacerbating matters from the employer's point of view is that under the LHWCA the employer must pay a successful claimant's attorney fee (33 U.S.C. § 928), against which no credit is given in the Jones Act case, no matter the outcome.

(2) ***The Employer's Credit In An LHWCA Proceeding For Prior Payment Of A Jones Act Award.***

LHWCA § 903(e) specifies that a credit is to be given to an employer for payment of a prior Jones Act award. When an LHWCA worker recovers tort damages from a negligent third party under § 905(b), the LHWCA gives a credit to the employer for the claimant's *net* recovery

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[36] This could occur for several reasons, one of which is that the claimant's recovery in a Jones Act case, but not under the LHWCA, is reduced by his comparative fault.

from the third party, meaning the recovery less all attorney fees and expenses. 33 U.S.C. § 933(f). The only authority on the subject is that although § 903(e) provides for a credit of "all amounts paid," the credit should —as in § 933(f)—include only the net amount (after deduction of attorney fees) that the claimant has received. *Bundens v. J.E. Brennerman Co.*, 46 F.3d 292, 304, fn. 24 (3d Cir. 1995).

Therefore the employer must pay the full Jones Act award but—assuming a 33% contingency fee to the claimant's attorney—receives a credit for only two-thirds of it. Another way that the litigation-weary employer may view the situation is that he has had to pay four sets of attorney fees: the claimant's attorney fee for the Jones Act case (because the employer paid it but did not get a credit for it), the claimant's attorney fee in the LHWCA case (per 33 U.S.C. § 928), and the employer's own attorney fees in both cases.

D. Having Received A Formal Award Of LHWCA Benefits, Papai Should Be Precluded From Further Pursuing Seaman Remedies.

The ALJ—after formal hearing—determined that Papai was an LHWCA worker and not a seaman and granted him a formal award of benefits. The issue now is not whether the ALJ was correct in that decision. The ALJ's decision was not appealed, and therefore it is final. The issue now is the effect of that final ALJ decision, namely whether it precludes Papai from seeking seaman remedies thereafter.

Papai should be precluded from seeking further seaman remedies. The mutual exclusivity of the two remedy schemes resulting from the text of 33 U.S.C. § 905(a) mandates this result. Also, this case meets all the requirements of administrative collateral estoppel since the ALJ was acting in a judicial capacity and resolved a disputed issue of fact (Papai's status) properly before it that the parties actually litigated. Therefore the Court of Appeals decision below should be reversed, and the District Court's

ruling that Papai was not a seaman should be reinstated, on the ground that Papai is now precluded from seeking seaman status.

II. A CLAIMANT'S STATUS AS A SEAMAN SHOULD BE BASED UPON HIS CONNECTION TO THE VESSEL TO WHICH HE IS ASSIGNED WHEN INJURED OR, IN CERTAIN CIRCUMSTANCES, AN IDENTIFIABLE GROUP OF VESSELS BELONGING TO HIS EMPLOYER.

A. To Be Considered A Seaman, The Claimant Must Have A Connection To A Vessel Or Identifiable Group Of Vessels That Is Substantial In Both Duration And Nature.

In *Chandris, Inc. v. Latsis*, —— U.S. ——, 115 S.Ct. 2172, 132 L.Ed. 2d 314 (1995), the Supreme Court noted that since its decision in *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), the law has been clear that remedies under either the Jones Act or the general maritime law are available only to seamen, not to land-based maritime workers. *Chandris*, 115 S.Ct. at 2185, 132 L.Ed. 2d at 331. In *Chandris* the Court described the somewhat erratic course that the precedents have steered in trying to differentiate seamen from land-based maritime workers. A particularly vexing issue has been what employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman. One fundamental principle underlying this issue is that a claimant's status does not depend upon the place where the injury occurs but upon the nature of the claimant's work and his relationship to the vessel. *Id.*, 115 S.Ct. at 2186, 132 L.Ed. 2d at 332. Thus seamen may recover under the Jones Act or the general maritime law whether they are injured on or off the ship, and land-based workers injured on a vessel in navigation remain covered by the LHWCA, not by seaman remedies. *Id.* "It is therefore well settled after decades of judicial interpretation that the Jones Act inquiry is fundamentally status-based: land-based maritime workers do not become seamen because

they happen to be working on board a vessel when they are injured . . ." *Id.*

Thus the prerequisite for seaman remedies is seaman status, and seaman status in turn is dependent upon the nature of the claimant's work and his relationship to the vessel. In *Chandris* the Court set forth the required connection to a vessel for the claimant to have seaman status:

> . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

115 S.Ct. at 2190, 132 L.Ed. 2d at 337.

The Court of Appeals decision in this case calls into question whether this standard applies to the vessel to which the claimant is currently assigned or to all vessels on which the claimant has worked.

B. Normally Seaman Status Is Based Upon The Claimant's Relationship To The Vessel To Which He Is Assigned When The Injury Occurs. However Under Certain Circumstances The Fleet Seaman Doctrine Allows Consideration Of The Claimant's Relationship To An Identifiable Group Of Vessels Belonging To The Claimant's Employer.

Chandris requires (as had prior law) that to be a seaman a claimant must have a connection to a vessel in navigation that is substantial in duration and nature. Normally, the court considers the claimant's relationship only to the specific vessel to which he is assigned when injured. However, an exception has developed to this rule. The seminal case for this exception is *Braniff v.*

Jackson Ave.—Gretna Ferry, Inc., 280 F.2d 523 (5th Cir. 1960). In that case Braniff was a full-time employee of a ferry company, in charge of the maintenance and repair of a number of ferry boats. He boarded each of the ferries every day. He would spend varying amounts of time on them while they were operating, depending upon their maintenance and repair needs. He was not, however, assigned to any particular ferry. The Fifth Circuit Court of Appeals recognized that "[t]he usual thing, of course, is for a person to have a Jones Act seaman status in relation to a particular vessel." 280 F.2d at 528. The court ruled that a claimant nevertheless could be a seaman if—assuming all other seaman status requirements were met—the claimant's work was on several specified vessels instead of just the one on which he was injured. *Id.*

A line of cases developed thereafter in the Fifth Circuit refining this exception, which became known as the "Fleet Seaman Doctrine." [37] In general, the Doctrine has been applied only where the courts have considered it inappropriate to exclude from seaman status a maritime worker who regularly performs seaman's work for a specific employer on a number of different vessels, to none of which the worker has a "permanent" or even "substantial" connection. Courts have considered it unfair to exclude from seaman status a worker who in all respects would be considered a seaman except that his employer frequently moves him from vessel to vessel.

The Doctrine has a limitation: the claimant must have a permanent or substantial connection to a fleet of vessels *under common ownership or control.*

> By fleet we mean an identifiable group of vessels acting together or under one control. [Footnote omit-

[37] The line of cases is described in Morrison, "The Fifth Circuit's Identifiable Fleet Requirement For Seaman Status Under the Jones Act," 31 Willamette L. Rev. 53 (1995); *see also* Robertson, "The Law of Seaman Status Clarified," 23 J. Mar. L. & Com. 1, 16-22 (1992).

> ted.] We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

Barrett v. Chevron. U.S.A. Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (*en banc*). *Accord, Bach v. Trident S.S. Co.*, 920 F.2d 322, 324-326 (5th Cir. 1991), *vacated and remanded*, 500 U.S. 949, 111 S.Ct. 2253, 114 L.Ed. 2d 706, *reinstated on remand*, 9 47 F.2d 1290 (5th Cir. 1991). In *Bach* the court stated: "Dozens (perhaps hundreds) of seaman status cases have come before us, but we have never made an exception to the core requirement that the injured worker show attachment to a vessel or identifiable fleet of vessels." 920 F.2d at 326. In *Campo v. Electro-Coal Transfer Corp.* 970 F.2d 51, 52 (5th Cir. 1992), reinstating on different grounds *Campo v. Electro-Coal Transfer Corp.*, 955 F.2d 10 (5th Cir. 1990), the Court of Appeals affirmed the District Court's directed verdict that Campo, who was injured on a barge while unrolling its cargo cover, was not a seaman. He spent most of his time dockside operating an unloading machine, but spent about 40% of his time aboard various vessels performing typical deckhand functions to facilitate cargo operations. He worked for short periods aboard a large number of vessels doing this work. In denying Campo's contention that his seaman status should be considered in regard to his work on the "fleet" of vessels on which he worked, the Court of Appeals noted that Campo did not establish common control of the three groups of vessels that he contended were a fleet, and that he was randomly assigned to vessels without regard to ownership or control of the vessels. The court stated: "It is well established that a large number of variously owned and controlled vessels does not constitute a fleet." 970 F.2d at 53.

In *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3d Cir. 1994), the Third Circuit Court of Appeals extensively and cogently discussed the history, purpose, and requirements of the Fleet Seaman Doctrine. Reeves was a maritime worker injured aboard the dredge BECKY BETH while it was working on a non-navigable lake. Because Jones Act coverage requires that the claimant's work be connected to a vessel on navigable waters, Reeves could not be considered a seaman if his status was determined by reference only to his work on the BECKY SMITH. In his employment before his work on that dredge, however, Reeves had a long history as a dredge welder with a different employer, during which he clearly was a seaman. His work on the BECKY SMITH was a short-term assignment through his maritime union while he was temporarily laid off by his prior employer, to which he had the right to return when work became available again. Reeves contended that his overall employment history qualified him for seaman status, relying upon the Fleet Seaman Doctrine. The District Court granted summary judgment that Reeves was not a seaman, and the Court of Appeals affirmed.[38]

The Court of Appeals in *Reeves* analyzed the Fleet Seaman Doctrine in detail, reciting its development in the Fifth Circuit, and finding it to be consistent with Supreme Court authority. The *Reeves* opinion summarized the Doctrine as follows:

> As we stated above, traditionally a seaman's status is tied to a particular vessel, resulting in an employee losing his seaman status if he is assigned to a non-navigable vessel, even if within the employer's fleet. The Fleet Seaman Doctrine in our view applies to an employee, one who is predominantly assigned by his employer to a navigable vessel, but who occa-

[38] Reeves had a "substantial connection" to the BECKY BETH, unlike Papai's relationship to the Tug in this case. The cases are analogous, however, on the point whether a worker who—when injured during a work assignment in which he is not a seaman—can nevertheless be granted seaman status because of prior work assignments.

> sionally is assigned *by that same employer* to non-navigable vessels. It would also apply to one who is assigned to a number of navigable vessels and spends some time on shore, as in *Brantiff*. The doctrine protects the employee from losing his status as a seaman when on temporary non-navigable assignments or when assignments to a number of vessels preclude attachment to one.

26 F.3d at 1256. [Emphasis in original.]

The *Reeves* opinion was careful to point out that the "fleet" to be considered is that of the claimant's employer when the claimant is injured.

> The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer. The term "fleet" refers to the fleet of vessels owned by the employer, not the fleet of vessels on which the employee has worked.

26 F.3d at 1256.

* * * *

> We agree with the en banc opinion in *Barrett*, that a fleet is an identifiable group of vessels acting together or under one control . . . The case law uniformly rejects the claim that "fleet" means any group of vessels an employee happens to work aboard. At a minimum, the ships must take their direction from one identifiable central authority to constitute a fleet.

26 F.3d at 1257-8.

The Supreme Court has not directly addressed the Fleet Seaman Doctrine. In *Chandris*, however, this Court favorably cited the Fifth Circuit formulation of the Doctrine (115 S.Ct. at 2189, 132 L.Ed. 2d at 336-7), and adopted its standard formulation by requiring that a claimant's status be determined by his connection to a vessel or an "identifiable group of such vessels." (115 S.Ct. at 2190, 132 L.Ed. 2d at 337.)

C. The Decision Of The Court Of Appeals Erroneously Allows A Claimant's Seaman Status To Be Determined By His Work History On All Vessels Of All His Employers.

The majority opinion below (Judge Poole dissenting) allows a claimant's status as a seaman to be determined by his work history on all vessels of all his employers. The opinion states that the standard to be used in determining seaman status shall be:

> In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the determination.

67 F.3d at 206, Pet. App. p. 8a.

The opinion does not define or explain the critical term "relevant time." The trier of fact presumably could consider the "relevant time" to be the claimant's entire working career.

This radical departure from precedent is based upon a misreading of the following sentence of dictum in *Chandris:* "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. . . ." 67 F.3d at 206, Pet. App. p. 7a, quoting *Chandris*, 115 S.Ct. at 2191, 132 L.Ed. 2d at 339. The Court of Appeals opinion seized upon the words "particular employer" and read that sentence to remove the limitation that status is based upon the claimant's work for his employer at the time of the injury. However, that portion of the *Chandris* opinion was addressing the need in some cases to judge the claimant's connection to a vessel or fleet of vessels not on the overall course of the claimant's work history with his employer, but only on the claimant's current assignment with that employer. For instance, the Supreme Court posited, someone who worked for years in a company's shoreside headquarters but who is then reassigned to its ship in a classic seaman's job and is

promptly injured is a seaman. Conversely, someone who is transferred to a desk job in the company's office and is injured in the hallway is not entitled to seaman status on the basi of prior service at sea. 115 S.Ct. at 2191, 132 L.Ed. 2d at 339-40.

It was in that context that the Supreme Court stated that it sees "no reason to limit the seaman status inquiry exclusively to an examination of the overall course of a worker's service with a particular employer." The key words in this sentence are "overall course," not "particular employer." This sentence narrowed the seaman status inquiry to the claimant's current assignment with a specific employer at the time of his injury. The Court of Appeals opinion turned the sentence upside down and interpreted it as an instruction to greatly expand the seaman status inquiry by allowing consideration of the claimant's work history with all his employers.[39]

The seaman status test in the Court of Appeals decision below also departs from precedent in extending the scope of the status inquiry to work performed *after* the accident. Its formulation of the seaman status test allows the trier of fact to consider all the work performed by the claimant before "and after, if any" the accident. (67 F.3d at 206, Pet. App. p. 8a.) Future or potential future employment at sea, however, should not change a claimant's status at the time of his injury. This would allow post-injury seagoing employment retroactively to turn a land-based worker into a seaman.

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed 205 (1952), Desper was killed

[39] The Fifth Circuit Court of Appeals has recognized that seaman status (including the application of the Fleet Seaman Doctrine) should be analyzed relative to the claimant's current work assignment. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1075-6 (5th Cir. 1986). ("If the plaintiff receives a new work assignment before his accident in which either his essential duties or his work location is permanently changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new job.")

while painting life preservers for use on a sight-seeing boat that was laid up on shore for the winter. The boat operated during the summer months. Desper had been a seaman on the boat the previous summer, and he was engaged to work as a seaman the following summer as well. Because he did not meet the seaman status test at the time of the accident, however, the Supreme Court found that he could not sue his employer under the Jones Act. The Court stated: "To be sure, he [Desper] was a probable navigator in the near future, but the law does not cover probable or expectant seaman but seamen in being." 342 U.S. at 190-1. To the same effect see *Heise v. Fishing Co. of Alaska*, 79 F.3d 903 (9th Cir. 1996) (injured land-based maintenance and repair worker not a seaman even though he expected to sail with the vessel when it returned to sea).

D. The Court Should Verify That Seaman Status Must Be Based Upon the Claimant's Work Assignment When Injured.

One of the few certain elements of the seaman status test over the years has been that the claimant's status is to be determined relative to the vessel to which he was assigned when injured. In narrow circumstances, the Fleet Seaman Doctrine extended the analysis to include a permanent employee's work on all his employer's vessels, when he was regularly assigned to work on those vessels, but was not assigned to work on any particular one of them. The Court of Appeals opinion now puts into play the claimant's work history for all employers during the (undefined and uncircumscribed) "relevant time." This approach makes seaman status essentially discretionary for the jury, and consequently unpredictable. Such an open-ended standard contradicts the proper rule illustrated by the Supreme Court's hypothetical examples in *Chandris*. There the Court postulated a situation in which a claimant had worked for years in an employer's shoreside office and was then reassigned to a ship in a classic seaman's job, and stated that such a person should not be denied seaman status if injured shortly after the reassignment. The stand-

ard that the Court of Appeals espoused below would allow a jury to decide that such a claimant was not a seaman. Indeed, if the claimant had worked *only* in a classic seaman's job with the employer, that standard would allow a jury to find that he was not a seaman at the time of injury because for several years previously he had worked shoreside for *other* employers. Similarly, the Court in *Chandris* postulated a situation in which a maritime worker is transferred to a desk job in the company's office and is injured in the hallway, stating that he should not be able to claim seaman status on the basis of prior service at sea. The Court of Appeals standard would allow the jury to decide that such a worker was a seaman.

In *Chandris* the Court noted the interests of employers and maritime workers alike in being able to predict who will be covered by the Jones Act and the LHWCA "before a particular work day begins." 115 S.Ct. at 2187, 132 L.Ed. 2d at 334. While an employer can be expected to know a worker's history with his company, the employer cannot be expected to know that worker's history in other jobs with other employers.[40] Thus predictability of the worker's status will be impossible.

The Court of Appeals opinion certainly will generate more litigation, since workers who otherwise are clearly not seamen based upon their work assignment when injured now will be able to seek a jury determination that prior or subsequent work assignments should control the status issue. Similarly, employers may challenge the status of workers who clearly are seamen when injured, by invoking prior or subsequent shoreside work. Even the best-intentioned jury will have difficulty determining the "relevant time" to consider. This Court should adopt the Third Circuit and Fifth Circuit formulation of the Fleet Seaman Doctrine, which constitutes a bright line rule that saves the time of the courts and the resources of the parties.

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[40] Many maritime workers, like Papai in this case, are sent out from union hiring halls.

Using the language of *Desper*, HTB submits that—by precedent and logic—seaman status should be accorded to seamen in being, not to former or expectant seamen. As the court stated in *Reeves v. Mobile Dredging & Pumping Co., Inc.*: "Because the Jones Act protects only seamen, the claimant must be a seaman at the time of the injury—the fact that he was once a seaman and that he or his employer intends for him to become a seaman once again will not suffice to cloak with seaman status the employee who has stepped out of seaman status, regardless of how near or remote in time or place. . . ." 26 F.3d at 1257, fn.13.

E. The District Court Correctly Determined That Papai Did Not Have A Sufficiently Substantial Connection To The Tug To Be A Seaman.

Papai was aboard the Tug for a one-day (8 hour) maintenance painting job. The Tug was tied to the dock throughout the day and unmanned by operational crew. He commuted from home to the jobsite, and he went back home from the jobsite. Under the rule of *Chandris v. Latsis*, this was not a sufficient connection with the Tug for Papai to be a seaman. Indeed, he was exactly the type of land-based maritime worker that the *Chandris* case excluded from seaman status.[41]

The Fleet Seaman Doctrine does not apply to Papai. That Doctrine concerns a maritime worker who is regularly employed on vessels of a single employer, but who has no substantial connection to any particular vessel of that employer. Papai was not a regular employee of HTB; he worked for several employers. Papai's jobs with HTB were transitory one or two day jobs that Papai obtained through the IBU hiring hall from time to time.

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[41] In the District Court Papai argued that he should be considered a seaman because his job title was "deckhand." The Supreme Court rejected an identical argument in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260, 60 S.Ct. 544, 84 L.Ed. 732 (1940). There the Court stated that crewmember status depends upon the claimant's actual duties, not his job title as deckhand.

Each of his jobs for HTB was self-contained, not continuous. His work for HTB was sporadic and happenstance. Under such circumstances, the Fleet Seaman Doctrine does not apply to Papai for his injury on the Tug. The Supreme Court ruled in *Chandris* that if a maritime worker receives a new work assignment in which his essential duties are changed, the substantiality of his vessel-related work should be made on the basis of his activities in his new position. 132 L.Ed. 2d at 340, 115 S.Ct. at 2191-2. Each of Papai's jobs were discrete work assignments, as was his one-day maintenance painting job when he was injured. His connection to the Tug should be considered in view of that one-day work assignment only.

Even if Papai's overall work history with HTB is considered, he did not have a sufficiently substantial connection to HTB's vessels for seaman status. From January 1, 1989 until the accident on March 13, 1989, Papai had worked a total of 13 days for HTB on various vessels. His work was day to day, and he lived, ate, and slept at home. In the words of *Chandris*, he was one of "those land-based workers who have a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." 132 L.Ed. 2d at 337, 115 S.Ct. at 2190.

While seaman status is a mixed question of law and fact, it may be determined by summary judgment in appropriate circumstances. In *McDermott Int'l v. Wilander*, the Court stated: "If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury. . . . Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." 498 U.S. at 356.

The District Court correctly granted summary judgment on the seaman status issue. The facts do not admit

of reasonable dispute—Papai was a land-based worker at the time of his injury. The Court of Appeals decision below should be reversed, and the District Court's ruling that Papai was not a seaman should be reinstated.

CONCLUSION

HTB submits that this Court should rule that a formal award of LHWCA benefits—whether from an ALJ decision or a § 8(i) settlement—should preclude the recipient from thereafter obtaining seaman remedies. Such a rule not only comports with the text and purpose of the LHWCA, it is fair, clear, and easy to administer. It will prevent unnecessary, duplicative litigation of the status issue. Under this rule, the Court of Appeals decision should be reversed, and Papai should be precluded from further pursuing seaman remedies.

HTB also submits that this Court should confirm that status as a seaman should be based upon a claimant's connection to the vessel to which he is assigned when the injury occurs. The only exception should be when a claimant is a steady employee who regularly performs seaman's work for a specific employer on multiple vessels belonging to that employer. Then consideration should be given to the claimant's connection to those several vessels. This rule would comport with the accepted view of seaman status and present a clear guidepost to the trier of fact. Under either the proposed general rule or the exception, the Court of Appeals decision should be reversed, and the District Court's ruling that Papai was not a seaman should be reinstated.

Definition of seaman status has been a judicial nemesis; the frequent litigation and confusing results in status cases bear witness. The Supreme Court decisions in *McDermott*, *Gizoni*, and *Chandris* have helped to clear the fog. This case presents the opportunity to place clear channel markers on two more criteria for seaman status.

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